Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

RAMONA RATCLIFF,

Petitioner,

v.

EXXONMOBIL CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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55 pp

QUESTION PRESENTED

In this ADEA failure to re-hire case, did the Fifth Circuit err in affirming summary judgment when it held, that Plaintiff cannot survive summary judgment without showing that her qualifications were so superior to the non-protected party so as to "leap from the page"? By so holding, the Fifth Circuit, in effect, reestablishes "pretext plus" in employment cases which this Court specifically overruled in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000).

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2003

RAMONA N. RATCLIFF
PETITIONER

VERSUS

EXXONMOBIL CORPORATION
RESPONDENT

CIVIL APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Ramona N. Ratcliff respectfully prays that a Writ of Certiorari be granted to review the December 31, 2002 decision of the United States Court of Appeals for the Fifth Circuit affirming the decision of the United States District Court for the Eastern District of Louisiana granting summary judgment June 13, 2002.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals was rendered on December 31, 2002 and is unreported. The opinion of the trial court was rendered on June 13, 2002 and is also unreported.

JURISDICTION

The Judgment of the Fifth Circuit Court of Appeals was rendered on December 31, 2002. This Petition for

Writ of Certiorari is sought within 90 days and is timely pursuant to 28 U.S.C. § 1257 and 2101(c) and Rule 10(1)(c) of the Rules of Court for the U.S. Supreme Court.

STATUTES

1) Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, as amended.

2) Section 510 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1140.

STATEMENT OF THE CASE

Petitioner Ramona N. Ratcliff (Ratcliff) worked for Respondent ExxonMobil Corporation (Exxon) for over seventeen years in Litigation, Subsurface Engineering Department and elsewhere as an administrative assistant. In 1986, she was laid off because of a general downsizing, but then was rehired by Exxon in 1988. When she was rehired, Exxon reinstated her employment benefits at the point she was laid off, so that she lost no seniority or benefits. During the entire time Ratcliff had worked for Exxon, she was never disciplined or written up. In fact, she regularly received good annual reviews on her work performance. Ratcliff continued to sharpen her skills in the use of hot software applications such as Excel, PowerPoint and Access. In December 1999, she was again laid off with 390 other, overwhelmingly middle-aged employees as part of a general reduction in force, following Exxon's merger with Mobil.[1] At the time she

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[1]Of the 390 people laid off in New Orleans during the ExxonMobil merger, 340 were over the age of forty (87%) and only 50 were under forty (13%). It was admitted that none of the laid-off individuals was ever rehired by ExxonMobil. See Record Excerpt #2, Civ. Doc. #44 (Opposition Memo.), Exhibit B (Affidavit of Ramona

was laid off, Ratcliff was close to being vested in Exxon's "Pre-Social Security Benefit", which would have entitled her to company-reimbursed social security payments until she became qualified for the actual benefits paid by the Social Security Administration at age 62 (at a cost to the Company of almost $80,000.00). To be eligible for this benefit, Ratcliff had to be a fifteen-year employee and be 55 years of age. Ratcliff had been working at Exxon for over seventeen years, but she was only 54 years old at the time she was laid off.

Ratcliff did not remain unemployed for long. Because of her skills, Ratcliff soon got a similar job with Shell Oil, without benefits.[2] When Ratcliff heard that her old job in Subsurface Engineering at Exxon was being advertised, along with seven other positions, she was overjoyed. A rehire would mean, among other things, that Ratcliff would have picked up her benefits at the point she left off, and if she was ever laid off again, Exxon's pre-Social Security Benefit would have kicked in. A rehire at Exxon would have meant that the modest financial security she had worked for over seventeen years would have been hers.

But, Ratcliff soon discovered that Exxon would not even seriously consider her for her old job. Mr. Ray Lieber, Human Resources Manager for Exxon's U.S. Production East, quickly made it apparent to Ratcliff that he was not interested in hearing from her. His first words: "I thought you took the pension." In the same

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Ratcliff) ¶ 26.

[2]Ratcliff actually works for Kelly Temporary Services and is contracted out to Shell doing work which is similar in all respects to the work she did at Exxon.

conversation, Ratcliff suggested that she send Lieber an updated resume which indicated her new skills. The reply: "I'll get back with you. No, you don't have to send a resume. I know who you are. Exxon knows who you are." Ratcliff asked to be interviewed and tested, but again, she was refused even though a much younger former employee was tested, interviewed and rehired.[3] Several weeks later, Ratcliff learned that her former job had been given to a 49 year old female, Ms. Hazel Kratzer, who had never worked in Subsurface Engineering. These proceedings followed.

PROCEEDINGS BELOW

On December 4, 2000, Ramona N. Ratcliff timely filed a formal Charge of Discrimination with the United States Equal Employment Opportunity Commission. Ratcliff alleged that she had not been rehired for an administrative assistant position which she had successfully performed on account of her race and age. Following a perfunctory investigation, on May 30, 2001, the EEOC issued Ratcliff a Notice of Right to Sue letter.

On August 27, 2001, Ratcliff filed her Complaint with the United States District Court for the Eastern District of Louisiana alleging race and age discrimination under Title VII of the Civil Rights Act of 1964, as amended,

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[3]Sherlita Burrell, a 34-year-old female former employee was encouraged to submit a resume, fill out an application, test and interview. She was rehired. See Record Excerpt #5, Civ. Doc. #44, Exhibit B, ¶ 19. ExxonMobil claims to have considered Ratcliff for two jobs, but, unlike 34-year old Burrell, ExxonMobil reviewed only incomplete files for 54-year-old Ramona Ratcliff–files which did not reflect up-to-date training Ratcliff had received while contract working for Shell.

42 U.S.C. § 2000e-16, and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, et seq., as amended.[4] ExxonMobil Corporation answered on October 24, 2001, and this case was set for jury trial to commence on June 17, 2002.

On December 12, 2001, Ratcliff filed her First Supplemental and Amended Complaint which alleged an additional theory of law under Section 510 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1140.[5] Exxon answered on December 28, 2001,[6] and on April 16, 2002, after discovery between the parties was taken, Exxon filed its Motion for Summary Judgment.[7] Ratcliff filed her opposition on May 7, 2002,[8] and after several reply memoranda from the parties, the trial court, on June 13, 2002, issued its Order and Reasons and Judgment dismissing Ratcliff's claims in their entirety.[9]

Ratcliff thereafter timely filed her Notice of Appeal to the Fifth Circuit Court of Appeals on July 1, 2002.[10]

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[4]See Record Excerpt #1, Civil Docket. Civ. Doc. #1 (Complaint).

[5]Civ. Doc. #12 (Amended Complaint).

[6]Civ. Doc. #13 (Defendant's Answer to Amended Complaint).

[7]Civ. Doc. #30 (Defendant's Motion for Summary Judgment, hereafter "Summary Judgment Memo.").

[8]Civ. Doc. #44 (Plaintiff's Opposition to Defendant's Motion for Summary Judgment, hereafter "Opposition Memo.").

[9]Civ. Doc. #62-63 (Court's Judgment and Order and Reasons).

[10]Civ. Doc. #65 (Notice of Appeal).

After briefing, the Fifth Circuit, without oral arguments, issued its unpublished Opinion affirming the trial court's summary judgment. Ratcliff timely appeals to the United States Supreme Court.

REASONS FOR GRANTING WRIT OF CERTIORARI

The Fifth Circuit Court of Appeals has nullified this Court's teaching in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000) by, in effect, reinstating the "pretext plus" rule in failure to rehire ADEA cases.

In this particular case, the Fifth Circuit has refused to modify its pre-*Reeves* summary judgment rule which requires a non-moving party in a failure to rehire case to demonstrate that her qualifications "'must leap from the record and cry out ... that [she] was vastly — or even clearly — more qualified for the subject job.' *Price v. Federal Express Corp.*, 283 F.3d 715, 723 (5th Cir. 2002) (quotation marks and internal citations omitted)."

ARGUMENT

MAY IT PLEASE THE COURT:

Exxon claimed before the trial court on summary judgment that Ratcliff had "not a scintilla" of evidence to support her discrimination claims under Title VII and ERISA. But, Ratcliff has the following to support her case, in addition to her *prima facie* showing:

- Her long record of satisfactory service.
- An absence of write-ups or disciplinary problems.

- A history of actually performing satisfactorily the exact job for which Exxon was advertising.

- A suspiciously vague and off-putting response by Exxon's chief personnel officer, Ray Lieber to Ratcliff's initial inquiry.

- Lieber's discouraging Ratcliff's supplementing or updating her resume.

- Lieber refusing to interview Ratcliff while soliciting the interview of a similarly situated younger applicant, Sherlita Burrell.

- A recent background of widespread personnel actions which resulted in massive layoffs of Exxon personnel heavily weighted against those over forty years of age.

- An admitted record of rehiring not one of the over-forty personnel out of the hundreds Exxon had laid off.

- Ratcliff's status of being only a few months away from the vesting of a valuable employment benefit (the pre-Social Security retirement benefit).

- Exxon's ignoring its published personnel policy favoring re-employment of qualified previous hires in the case of Ratcliff.

Exxon responds, as its legitimate non-discriminatory reason for non-selection, that the person chosen over Ratcliff had survived corporate cutbacks and had scored higher on Exxon's "Ranking and Rating" scheme. But, Ratcliff shows that Exxon's hiring official

had no direct knowledge of the quality of work performed by the favored employee, Ms. Hazel Kratzer,[11] except that he knew that she had never performed any work in the position, while Ratcliff had successfully held the position for years.

Ratcliff further shows that she was never ranked or rated with the successful candidate, and that by its own terms, the Ranking and Rating scheme was not designed to measure performance outside a circumscribed rating "pool." On the other hand, her satisfactory annual reviews *were* designed for company-wide cross-comparison, and on that basis, she was very well qualified for the job.

Unlike the successful younger applicant who was rehired, Ms. Sherlita Burrell, Ratcliff was discouraged from updating her resume; she was also denied the courtesy of even interviewing for the job she had successfully performed for years.

When the trial court reviewed the evidence submitted by Ratcliff and Exxon, it reversed the presumptions in the law concerning summary judgments and viewed leniently the evidence submitted by Exxon and viewed that offered by Ratcliff strictly and skeptically. Ratcliff offers a circumstantial case of workplace discrimination involving Title VII and the ERISA statute of sufficient quality and quantity to present a question to the Jury.

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[11]Ms. Kratzer was significantly six years from acquiring the pre-Social Security benefit, worth $80,000 to Ratcliff.

A. Standard of review and applicable law.

Initially, it is the moving party's burden to establish that there is "no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Federal Rules of Civil Procedure 56(c); see also, *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1195 (5th Cir. 1986). Because summary judgment is a "drastic device" cutting off a party's right to present his or her case to the jury, the moving party bears a "heavy burden" of demonstrating the absence of any material issues of fact. Thus, the moving party must show there are no triable issues of fact as to matters upon which it has the burden of proof at trial.

The burden of proof at trial is generally determined by the pleadings. Therefore, on a summary judgment motion, the moving party must generally demonstrate that there is no triable issue as to the matters alleged in its own pleadings. This requires the moving party to establish beyond controversy every essential element of its claim or defense:

> **If the movant bears the burden of proof on an issue, either because he is the plaintiff or as a defendant he is asserting an affirmative defense, he must establish beyond peradventure all of the essential elements of the claim or defense to warrant judgment in his favor.**

Fontenot, supra, at 1194.

B. Exxon succeeded in identifying no specific issues where Ratcliff has no supporting evidence; furthermore, Exxon failed to demonstrate the absence of such evidence.

1. *Ratcliff's Prima Facie Case*

Ratcliff can establish a *prima facie* case of discrimination under Title VII or the ADEA by establishing 1) that she is a member of a protected class, 2) she was qualified for the position, 3) she was treated less favorably that others not in the protected class, and 4) the position was filled by a person not in the protected class.

Here, Ratcliff, age 54 and within one year of qualifying for the pre-Social Security benefit plan, is a member of the protected class. She successfully held the position for which she applied for a number of years and received all good performance reviews.[12] Ratcliff was treated less favorably than Ms. Hazel Kratzer, age 49, who filled the Subsurface Engineering position and had no experience in that job.[13] She was furthermore treated less favorably than Ms. Sherlita Burrell, a rehire and 34 years of age, who was given the opportunity to interview.

2. *Favorable treatment given to similarly situated younger employee.*

Lieber gave a similarly situated, younger candidate who was a former employee of Exxon the opportunity to

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[12]Civ. Doc. #44, Exhibit F-J (1993-1994 Personnel Development Reports 1993, 1994, 1995, 1997, 1998 -1999.

[13]Civ. Doc. #44, Exhibit C (January 18, 2001 Letter from Ray Lieber to EEOC).

test, submit an updated resume and interview for the open positions. This individual is Sherlita Burrell. Here, Ratcliff was seeking interview time when she called Lieber. She reasonably assumed that her previous experience in the same position would show to her advantage when compared to other candidates with no experience in Subsurface Engineering whatsoever.

Just as telling is the absence of any authority for Lieber's statement that he "found" that Ratcliff did not need to retest. Where did Mr. Lieber "find" this to be so? According to whom, and according to what policy? No authority has been advanced and certainly none has been provided either to the EEOC, to Ratcliff, or to the trial court. A jury could reasonably conclude that Lieber was uncomfortable with Ratcliff applying, didn't want to consider her, didn't consider her and didn't want her retested and interviewed. Lieber's actions belie and illuminate his attitude and frame of mind, which is of course, central to the consideration of a jury.

3. *Ratcliff's "file" was given to no decision maker.*

If, as Exxon claims, it considered Ratcliff for two positions at Exxon, it knowingly failed to give her a competitive opportunity equal to younger employees who were ineligible for the pre-Social Security benefit. The so-called file given to the hiring official was outdated and inadequate because of Lieber's guilty refusal to encourage Ratcliff to submit updated information.

5. *Significance of Exxon's unexplained departure from its published policy and procedure regarding rehires.*

The Fifth Circuit, in *Tyler v. Union Oil Co. of Calif.*, 304 F.3d 379 (5th Cir. 2002), found that similarly situated plaintiffs carried their burden of proof in an age discrimination case. On its face, Exxon's policy clearly permits the rehire of former employees who have demonstrated a mastery of particular skill sets. Here, for no satisfactory reason, for the purpose of a summary judgment motion, Exxon hired a younger woman, Ms. Sherlita Burrell, with no practical experience in the job in which she was placed.

6. *Ratcliff's proof of nexus between her age and the lack of consideration for rehire.*

In the face of Exxon's announced policy for favoring rehires, it did not even extend Ratcliff the opportunity for interview. Ratcliff was in a particular administrative situation relative to her age with Exxon. Ratcliff is, as Exxon admits, vested with retirement benefits and, as such, is a participant in the pre-Social Security benefit plan.[14]

If Ratcliff's retirement situation, in itself, did not point to a nexus, the consideration of her administrative situation in the context of Exxon's slashing of its older work force does so provide. Of the 390 people laid off in the New Orleans area during the ExxonMobil merger, 340 were over the age of forty, or 87%, and only 50 were under

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[14]Because Ratcliff was only 54 years of age, she was not eligible for the full benefit. The full benefit applies to those employees who are 55 years of age with 15 years of service. Ratcliff was within months of qualifying for this plan and would have been eligible for it had she been rehired. See Record Excerpt #7, Civ. Doc. #44, Exhibit A (Exxon Mobil Corporation Pension Plan SPD, January 2000).

forty, or 13%.[15] Nowhere does Exxon challenge the facts or even suggest that the inference should not reasonably be made that one of the aims of that reduction in force was to prune away older workers from its work force. Significantly and only after a protracted discovery battle and after being required to do so by the Magistrate Judge did Exxon admit that none of the 390 people who had been laid off were ever considered for rehire.

And, in a motion for summary judgment, all reasonable inferences are to be deemed in favor of the party resisting the summary judgment.

C. Errors in the courts below.

Ratcliff has shown here that she was qualified for the job, that she did her job well, that she constantly sought additional training, and that she had in many ways created and defined the job herself. It has also been shown that Exxon had a public policy permitting the rehire of satisfactory personnel.

In light of these facts, it defies logic and human experience to argue that a fact-finder could not reasonably suspect the presence of an illicit motive. Once such a suspicion exists, *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000) instructs that such a suspicion may form the basis for the fact-finder's inference of impermissible motive. *Reeves* also discusses that the most favored course is to preserve trial in cases where there is doubt surrounding the proffered, legitimate, non-discriminatory reason.

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[15]Civ. Doc. #44, Exhibit B, ¶ 26.

1. *Errors in the Trial Court*

In stark contrast to the above, the trial court indicates that its understanding of the *Reeves* case requires that Ratcliff show "considerable evidence of pretext."[16] The trial court failed to view the evidence presented on the motion in the light most favorable to the opposing party, Ratcliff, when it stated "the only evidence in the record that *could* relate to plaintiff's age is Lieber's statement to plaintiff after plaintiff initially asked him her former job opening, that he thought she had 'taken the pension.'" This is to ignore all the circumstantial evidence outlined herein. The trial court failed to even consider Exxon's company policy actively permitting rehire of satisfactory personnel, the unequal chance for an interview, and the fact that Exxon was not interested in obtaining an updated resume from Ratcliff. The trial court's discussion on pages 27-28 regarding Ratcliff's evidence shows a categorical rejection of the standard annunciated in *Anderson, supra.*

2. *Errors in the Fifth Circuit Court of Appeals*

In *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1986), the Fifth Circuit Court of Appeals adopted the "pretext plus" summary judgment standard which required the non-moving party in a motion for summary judgment to come forward with facts over and above those put forth in his prima facie case after proving pretext on the part of the employer.[17]

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[16]See Record Excerpt #3, Civ. Doc. #62, Order and Reasons at p. 26. ("As opposed to this case, when the Fifth Circuit has applied *Reeves* to reverse a district court's grant of summary judgment, there was considerable evidence of pretext.")

[17]The Fifth Circuit was joined by the Third, Sixth, Seventh,

In *Reeves*, this Court unanimously overruled the Fifth Circuit and held:

> **A plaintiff's prima facie case of discrimination (as defined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), and subsequent decisions), combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, may be adequate to sustain a finding of liability for intentional discrimination under the ADEA.**

In its unpublished Opinion, in this case, the Appeals Court in effect nullified this Court's teachings in *Reeves* when it held:

> **The district court accepted that Ratcliff had stated a *prima facie* case of discrimination under the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), burdenshifting scheme. Citing the relative qualifications of the applicants, ExxonMobil offered legitimate, nondiscriminatory reasons for the employment decision. Under the *McDonnell Douglas* framework, a plaintiff may show those reasons are pretextual. Ratcliff essentially bases her claim of pretext on her conclusory opinion that she was more qualified**

Eighth and Eleventh Circuits.

> **than those hired for the positions. *"In order to establish pretext by showing the losing candidate has superior qualifications, the losing candidate's qualifications must leap from the record and cry out ... that [she] was vastly — or even clearly — more qualified for the subject job." Price v. Federal Express Corp.*, 283 F.3d 715, 723 (5th Cir. 2002) (quotation marks and internal citations omitted). Ratcliff has not satisfied that standard.** *Emphasis supplied.*

Pretext in the ADEA context means that, more likely than not, an employer has failed to state the real reason for the adverse job action against an older person.[18] Raising the plaintiff's burden in a summary judgment motion beyond the *Reeves* standard in a failure to re-hire case is contrary to this Court's jurisprudence: qualifications which "leap from the record and cry out" is nothing more than "pretext plus" in disguise.[19]

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[18] *Reeves, supra*, states:

> **Given that petitioner established a prima facie case of discrimination, introduced enough evidence for the jury to reject respondent's explanation, and produced additional evidence of age-based animus, there was sufficient evidence for the jury to find that respondent had intentionally discriminated.**

[19] Research has revealed no other federal app eals court in the nation which has similarly so held. See, for examples of contrary rulings, *Equal Employment Opportunity Commission v. Sears Roebuck & Co.*, 243 F.3d 846 (4th Cir. 2001); *Malacara v. City of Madison*, 224 F.3d 737 (7th Cir. 2000); *Mohr v. Dustrol, Inc.*, 306 F.3d

CONCLUSION

Ramona Ratcliff had satisfactorily performed the exact job at issue in this lawsuit for several years. A former supervisor, Tricia Weeks, wrote specially in her personnel file that "Ramona has excellent work skills and attitude. She is willing to undertake any assigned task and able to complete it well."[20]

Ratcliff's job at Exxon was eliminated in December 1999 as part of a "restructuring" which resulted in the termination of 390 in the New Orleans area, 340 of that number were over age forty (40).

When she applied for exactly the same job at Exxon several months later, Ratcliff was a member of a protected class and was due to become eligible for an $80,000 employment benefit. She has demonstrated in this record that a younger, non-eligible employee with no previous experience in the job was given an interview and encouraged to submit a current resume in preference to her. A fact-finder could draw the reasonable inference that Ratcliff was denied serious consideration for rehire due the presence of an impermissible motive on the part of Exxon's Human Resources Director, Ray Lieber.

In *Reeves*, this Court stated:

> **The standard for judgment as a matter of law under Rule 50 mirrors the standard for summary judgment under Rule 56. Thus, the court must review**

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636 (8th Cir. 2002).

[20]See Record Excerpts #8.

> **all of the evidence in the record, cf., e.g., *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538, drawing all reasonable inferences in favor of the nonmoving party, but making no credibility determinations or weighing any evidence, e.g., *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554-555, 110 S.Ct. 1331, 108 L.Ed.2d 504.**

Plaintiff can establish pretext under *Reeves*. The Fifth Circuit should not be allowed to re-establish pretext plus in discrimination law piecemeal. This Honorable Court should REVERSE the Judgment of the courts below and remand for further proceedings.

Respectfully submitted,

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(Any footnotes trail the end of each document.)
No. 02-30763

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RAMONA RATCLIFF,
Plaintiff-Appellant,

v.

EXXONMOBIL CORPORATION,
Defendant-Appellee.

Summary Calendar
D.C. Docket No. 01-CV-2618-R

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans.

Before BARKSDALE, DeMOSS, and BENAVIDES, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: January 22, 2003

No. 02-30763

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RAMONA RATCLIFF,
Plaintiff-Appellant,

v.

EXXONMOBILE CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana (Ol-CV-2618-R)

Before BARKSDALE, DEMOSS, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Ramona Ratcliff appeals the summary judgment awarded against her claims for: age and race discrimination under the Age Discrimination in Employment Act (ADEA) and Title VII; and denial of pension rights under the Employee Retirement Income Security Act (ERISA).

Ratcliff was employed as a secretary by Exxon for 17 years, until a downsizing in 1999, connected with the company's merger with Mobil. In December 1999, Ratcliff was laid off and given a severance package. In September 2000, ExxonMobil conducted a search to fill eight positions in its New Orleans office.

Ratcliff, with 16 others, applied for these positions. She was then 54 years old. When she applied, she spoke with

the hiring supervisor, who noted: "I thought you took the pension". Ratcliff was one of five applicants considered for more than one position. In both instances, however, ExxonMobil hired another applicant. Of the eight hirees, six were minorities and three were 49, 51 and 58 years old, respectively.

Ratcliff had received average to low performance ratings during her previous Exxon employment. And, her former supervisor informed those in charge of the hiring decisions that Ratcliff lacked necessary computer skills and had shown no desire to improve them. The hired candidates were allegedly more qualified than Ratcliff. In one case, the employee had more than 28 years of experience with Exxon and had consistently received higher grades than Ratcliff on her performance reports. In the other case, the employee, unlike Ratcliff, had extensive experience with relevant computer programs.

A summary judgment is reviewed de novo. E.g., Daniels v. City of Arlington, 246 F.3d 500, 502 (5th Cir.), cert. denied, 534 U.S. 951 (2001) . Such judgment is proper when there exists no genuine issue of material fact and the movant is entitled to a judgment as a matter of law. FED. R. CIV. P. 56(c). We "view the facts and the inferences to be drawn therefrom in the light most favorable to the nonmoving party". Daniels at 502.

The district court accepted that Ratcliff had stated a prima facie case of discrimination under the McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), burden-shifting scheme. Citing the relative qualifications of the applicants, ExxonMobil offered legitimate, non-discriminatory reasons for the employment decision. Under the McDonnell Douglas framework, a plaintiff may show those reasons are pretextual. Ratcliff

essentially bases her claim of pretext on her conclusory opinion that she was more qualified than those hired for the positions. "In order to establish pretext by showing the losing candidate has superior qualifications, the losing candidate's qualifications must leap from the record and cry out ... that [she] was vastly — or even clearly — more qualified for the subject job." Price v. Federal Express Corp., 283 F.3d 715, 723 (5th Cir. 2002) (quotation marks and internal citations omitted) . Ratcliff has not satisfied that standard.

Ratcliff also claims ExxonMobil's refusal to rehire her violates § 510 of ERISA ("unlawful ... to discharge ... or discriminate against a participant . ... for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan."). 29 U.S.C. §1140. She bases this claim on the statement made to her by the hiring supervisor. Even assuming a non-employee could bring suit under § 510 for a company's failure to rehire her, Ratcliff has offered no evidence of discriminatory intent to prevent the attainment of benefits. See Stafford v. True Temper Sports, 123 F.3d 291, 295 (5th Cir. 1997)

AFFIRMED

Footnotes

*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

CIVIL ACTION NO: 01-2618 SECTION: "R" (1)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RAMONA RATCLIFF,
Plaintiff-Appellant,

v.

EXXONMOBILE CORPORATION,
Defendant-Appellee.

ORDER AND REASONS

Before the Court is defendant's motion for summary judgment. For the following reasons, the Court grants the motion.

I. Background

This case arises from defendant's decision not to rehire plaintiff after she was terminated following Exxon's merger with Mobil in the fall of 1999. Plaintiff's tenure at Exxon began in 1979 when she joined the Risk Management Section as a secretary. She held that position until 1986, when she was laid off during a downsizing. On December 21, 1988, Exxon rehired plaintiff to work as a secretary in its Litigation department. Plaintiff remained in the Litigation department until 1997. In 1997 plaintiff asked for and received a transfer to the Subsurface Engineering (SSE) department, where she worked as an administrative assistant until the Fall of 1999. The administrative assistant's position required more sophisticated computer skills than the secretary's position.

After Exxon and Mobil merged in the Fall of 1999, plaintiff was terminated along with a number of other Exxon employees. Of the employees ExxonMobil considered for termination, plaintiff fell in the bottom quarter of the company's rankings. Plaintiff was 53 years old when she was terminated, and she had a vested right to benefits under Exxon's pension plan. Exxon gave plaintiff a severance package and benefits because plaintiff was between the ages of 50 and 55 and because she had ten years of experience with the company. Plaintiff received additional benefits in return for a full and complete release of Exxon for any and all claims related to plaintiff's termination. It is undisputed that the statute of limitations has run on any claims that plaintiff might have had as a result of her termination in 1999.

Plaintiff went to work for Kelly Temporary Services in April 2000. Kelly contracted plaintiff out to work for Shell Oil in a job similar to the one plaintiff performed for Exxon. Then, in September 2000, eight positions became available at the ExxonMobil New Orleans Production Organization. Six of the available positions were for administrative assistants, and two of the available positions were for office assistants. These eight positions were in the Procurement, Geoscience, Surface, Regulatory, Subsurface, and Accounting departments.

On September 15, 2000, plaintiff contacted Ray Lieber, ExxonMobil's Human Resources manager in New Orleans, to express an interest in the available positions. Lieber told plaintiff that as a former Exxon employee she did not have to submit a new résumé. ExxonMobil required job applicants who were not presently or formerly employed at ExxonMobil to submit résumés, undergo a series of tests and participate in an interview.

ExxonMobil decided whether to hire former and present employees based on consultations with the applicant's last Exxon supervisor and on a review of the applicant's employment file. Lieber submitted the names of two to four qualified candidates to one department with an available position at a time, so that no two departments would consider the same applicant simultaneously. After a department made its hiring decision, Lieber submitted the remaining candidates to another department if an available position remained open and the applicant was qualified for it. Of the 17 candidates, plaintiff was one of only five who were considered for two positions.

Plaintiff was first considered for a position with the SSE department, her former department. ExxonMobil considered K.H.fn1 for that position. K.H. was a 49-year old white female who was a current ExxonMobil employee with 28 years of experience at the company. The head of the SSE department made the hiring decision. He reviewed plaintiff's employment record with Exxon, and he consulted with Roger Frederickson, plaintiff's last supervisor in the SSE department. Plaintiff's employment record contains positive reviews, but she regularly received "C" grades, which corresponded to the bottom quarter of her peer group and was the lowest acceptable grade under the company's "Ranking and Rating" system. Defendant used the "Ranking and Rating" system to compare the performances of similarly situated employees. Plaintiff was also consistently ranked in the lowest third of her peer group under an earlier ranking system. K.H. received a "B" ranking in her 1999 evaluation. In addition, Frederickson reported that plaintiff did not react positively to suggestions that she should gain additional computer skills and a greater knowledge of the SSE process in order to increase her contribution to

the department's overall effectiveness. Furthermore, since 1995 plaintiff's supervisors assessed that she had no potential for promotion. ExxonMobil considered an employee's potential to advance to higher levels of responsibility in its employment decisions. Based on plaintiff's performance appraisals, her employee rankings, Frederickson's opinion, and K.H.'s employment record, the head of the SSE department decided to hire K.H. instead of plaintiff.

After plaintiff failed to obtain the position in the SSE department, Lieber submitted plaintiff's name to the Regulatory, Safety, and Operations Integrity Group for the position in the Regulatory 2 department. The position in the Regulatory 2 department required sophisticated computer skills. The group manager reviewed plaintiff's employment file and consulted with Roger Frederickson. Based on his evaluation, the manager decided not to hire plaintiff. He determined that plaintiff's computer skills were not as strong as those of B.M., a 30-year old white female. ExxonMobil determined that B.M. had advanced computer skills and that she had previous relevant work experience in the computer field with Cisco Systems, Inc.

By the time plaintiff was evaluated for the Regulatory 2 position, ExxonMobil had filled five of the six other vacancies. The last available position was in the accounting group for which plaintiff was not qualified. ExxonMobil filled those six jobs with a 58-year old African American female, a 36-year old African American female, a 38-year old African American female, a 23-year old white male, a 35-year old African American male, and a 51-year old African American male.

When plaintiff was not rehired, she filed a charge with the Equal Employment Opportunity Commission (EEOC) in which she alleged that ExxonMobil did not rehire her because of her age and race. The EEOC declined to bring charges against ExxonMobil. On May 30, 2001, the EEOC issued plaintiff a right to sue letter. Plaintiff then filed this lawsuit against ExxonMobil for failing to rehire her based on her age and her race in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, et seq., and Section 717 of Title VII, 42 U.S.C. § 2000e-l6, respectively. Plaintiff further alleges that defendant refused to rehire her for the purpose of denying her rights to pension benefits in violation of Section 510 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1140. Plaintiff also alleges that defendant defamed her and committed negligent misrepresentation or fraud in a letter to the EEOC. Defendant seeks to dismiss plaintiff's claims on summary judgment.

II. Discussion

A. Legal Standard

Summary judgment is appropriate when there are no genuine issues as to any material facts, and the moving party is entitled to judgment as a matter of law. See FED. R. CIV. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-323, 106 S. Ct. 2548, 2552 (1986) . A court must be satisfied that no reasonable trier of fact could find for the nonmoving party or, in other words, "that the evidence favoring the nonmoving party is insufficient to enable a reasonable jury to return a verdict in her favor." Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 178 (5th Cir. 1990) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511 (1986)). The moving party bears the burden of

establishing that there are no genuine issues of material fact.

If the dispositive issue is one on which the nonmoving party will bear the burden of proof at trial, the moving party may satisfy its burden by merely pointing out that the evidence in the record contains insufficient proof concerning an essential element of the nonmoving party's claim. See Celotex, 477 U.S. at 325, 106 S. Ct. at 2554; see also Lavespere, 910 F.2d at 178. The burden then shifts to the nonmoving party, who must, by submitting or referring to evidence, set out specific facts showing that a genuine issue exists. See Celotex, 477 U.S. at 324, 106 S. Ct. at 2553. The nonmovant may not rest upon the pleadings, but must identify specific facts that establish a genuine issue exists for trial. See id. at 325, 106 S. Ct. at 2553-54; Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1996)

In an employment discrimination case, the Court must "focus on whether a genuine issue exists as to whether the defendant intentionally discriminated against the plaintiff." LaPierre v. Benson Nissan, Inc., 86 F.3d 444, 447-48 (5th Cir. 1996). The Court "must draw all reasonable inferences in favor of the nonmoving party, and (the Court] may not make credibility determinations or weigh the evidence." Reeves v. Sanderson Plumbing Prods., Inc. 530 U.S. 133, 120 S. Ct. 2097, 2110 (2000).

B. ADEA and Title VII

The ADEA provides that "[i]t shall be unlawful for an employer ... to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. §623 (a) (1). Similarly,

Title VII of the 1964 Civil Rights Act provides that "[it] shall be an unlawful employment practice for an employer . .. to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a).

The Fifth Circuit applies the McDonnell Douglas burden-shifting scheme to claims under the ADEA and under Title VII. See Russell v. McKinney Hosp. Venture, 235 F.3d 219, 222 n. 3 (5th Cir. 2000) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973)); Bauer v. Abermarle Corp., 169 F.3d 962, 966 (5th Cir. 1999). First, the plaintiff must establish a prima facie case of age discrimination by a preponderance of the evidence. See McDonnell Douglas, 411 U.S. at 802, 93 S. Ct. at 1826; Bauer, 169 F.3d at 966. A plaintiff may prove a prima facie case of discrimination by showing (1) that she is a member of a protected class, (2) that she was qualified for the position, (3) that she was fired or suffered an adverse employment action, and (4) that the employer continued to seek applicants with plaintiff's qualifications or that others similarly situated were more favorably treated. LaPierre, 86 F.3d at 448; Urbano v. Continental Airlines, Inc., 138 F.3d 204, 206 (5th Cir. 1998) . The elements of the plaintiff's prima facie case vary with the facts of the case and the nature of the claim. Id. at 448 n. 3.

Once established, the plaintiff's prima facie case raises an inference of discrimination. McDonnell Douglas, 411 U.S. at 802, 93 S. Ct. at 1824. The burden then shifts to the defendant to rebut that presumption by articulating a legitimate, nondiscriminatory reason for the challenged employment action. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255, 101 S.

Ct. 1089, 1094 (1981). "If the defendant articulates a reason that can support a finding that its actions were nondiscriminatory, the mandatory inference of discrimination created by the plaintiff's prima facie case drops out." Price v. Federal Express Corp., 283 F.3d 715, 720 (5th Cir. 2002) (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510-11, 113 S. Ct. 2742, 2749 (1993)).

The plaintiff then has the "opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." Burdine, 450 U.S. at 253, 101 S. Ct. at 1089. On summary judgment, the plaintiff must substantiate her claim of pretext through evidence demonstrating that discrimination lay at the heart of the employer's decision. Price, 283 F.3d at 720 (citing Rubinstein v. Adm'rs. of the Tulane Educ. Fund, 218 F.3d 392, 400 (5th Cir. 2000), cert. denied, 532 U.S. 937, 121 S. Ct. 1393 (2001)). To determine whether plaintiff can survive a motion for summary judgment, the Court will consider "the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law." Reeves, 530 U.S. 148-49, 120 S. Ct. 2109.

1. Plaintiff's Prima Facie Case

To establish discrimination for failure to hire, plaintiff must show (1) that she belongs to the protected class; (2) that she applied for and was qualified for the job; (3) that despite her qualifications, she was rejected; and (4) that ExxonMobil filled the position with a younger and/or non-protected person. See McDonnell Douglas, 411 U.S. at 802, 93 S. Ct. at 1824; see also Maureau v.

United Technologies Carrier Corp., 1998 WL 426219, *3 (E.D. La. 1998)

Defendant does not challenge that plaintiff has stated a prima facie case of race discrimination. Defendant contends, however, that plaintiff cannot establish a prima facie case of age discrimination as to its failure to rehire plaintiff for the position in the SSE department. Defendant argues that it hired a woman who is in the protected class and who is only slightly younger than plaintiff, which precludes an inference of age discrimination. The Court finds that this argument is unpersuasive.

In O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 116 S. Ct. 1307 (1996), the Supreme Court held that "the fact that an ADEA plaintiff was replaced by someone outside the protected class is not a proper element of the McDonnell Douglas prima facie case." 517 U.S. at 312, 116 S. Ct. at 1310. The Supreme Court reasoned that the ADEA banned discrimination against employees because of their age, and that therefore, the fact that one person in the protected class (over 40) lost out to another person in the protected class is irrelevant. Id. On the other hand, the Supreme Court has held that an inference of age-based discrimination cannot be drawn from the replacement of one worker by another worker "insignificantly younger." Id. at 312-13, 116 S. Ct. at 1310. Based on O'Connor, the Court finds that the mere fact that plaintiff's replacement was in the same age class is irrelevant. The issue remains, however, whether the five-year age difference between plaintiff and the successful applicant is "insignificant."

In Bienkowski v. American Airlines, 851 F.2d 1503 (5th Cir. 1988), the Fifth Circuit held that a showing that plaintiff was replaced by someone five years younger

presented a "close question" as to whether plaintiff established a prima facie case. See 851 F.2d at 1506; see also O'Connor, 517 U.S. at 312, 116 S. Ct. at 1310 (noting that three-year age difference would be "very thin evidence" of age discrimination) . The Fifth Circuit did not find this issue dispositive against plaintiff, however. Instead, it considered the relative ages of the plaintiff and his colleagues as evidence on the "ultimate issue" of "whether the plaintiff has been a victim of intentional age discrimination." Id.

Here, plaintiff was five years older than K.H. when ExxonMobil hired K.H. for the position in the SSE department. As in Bienkowski, the age disparity between plaintiff and K.H. creates a "close question" as to whether the age difference is enough to permit an inference of age discrimination. Following the Fifth Circuit's lead, this Court will factor in the relative ages of plaintiff and the successful applicants in its evaluation of the "ultimate issue" of discriminatory intent. Therefore, the Court finds that plaintiff can establish a prima facie case under the ADEA and Title VII.

2. Defendant's Legitimate, Non-discriminatory Reason

In response to plaintiff's prima fade case, ExxonMobil asserts as its legitimate, nondiscriminatory reason, that it did not rehire plaintiff because she was not the most qualified applicant for the jobs. Both of the persons responsible for making the hiring decisions testified that they chose other applicants because the other applicants were objectively better qualified than plaintiff and that neither plaintiff's age nor her race played any role in their determinations. See Def.'s Memo. in Supp.

of Mot. for Summ. J.; Ex. E, Killian Affidavit at ¶¶ 6-8, and Ex. F, Cleveland Affidavit at ¶¶ 4-6. They stated that they followed company policy and based their decisions in part on the opinion of plaintiff's former supervisor covering her performance in the SSE department. Plaintiff's former supervisor testified that he informed both of the relevant decisionmakers that plaintiff lacked relevant computer skills and knowledge of the SSE department processes and that she lacked the motivation to develop the new skills her job required. See id.; Ex. C, Frederickson Affidavit at ¶¶' 4-7. The decisionmakers also reviewed plaintiff's employment records which indicated that plaintiff had received low performance rankings between 1993 and 1999. See Def.'s Memo. in supp. of Mot. for Summ. J.; Ex. E, Killian Affidavit at ¶¶ 2-3, and Ex. F, Cleveland Affidavit at ¶¶ 2-3. If believed by the trier of fact, these reasons would support a finding that unlawful discrimination was not the cause of defendant's decision not to rehire plaintiff. See Jeffries v. Harris County Cmty. Action Ass'n., 693 F.2d 589, 590 (5th Cir. 1982) ("[T]he promotion of a better qualified applicant is a legitimate and nondiscriminatory reason for preferring the successful applicant over the rejected employee who claims the rejection was discriminatory."). Therefore, the presumption raised by the plaintiff's prima facie case disappears. Reeves, 530 U.S. at 143, 120 S. Ct. at 2106.

3. Pretext

Next, plaintiff is given the opportunity to demonstrate that defendant's articulated rationale is merely a pretext for discrimination. Reeves, 530 U.S. at 143, 120 S. Ct. 2106. If plaintiff can raise a genuine issue of material fact as to whether she has established pretext, that will suffice to avoid summary judgment. Id. ("[P]laintiff may attempt to establish that he was the victim of intentional

discrimination by showing that the employer's proffered explanation is unworthy of credence.") (internal quotations and citations omitted).

The Court finds that plaintiff offers no evidence that defendant's proffered reasons are pretextual. Although plaintiff advances a number of arguments to suggest that defendant's justification is false, these arguments do not contradict defendant's version of events.fn2 Rather, plaintiff argues that ExxonMobil should have placed more emphasis on her experience in her next-to-last position, should not have listened to her last supervisor, and should not have used the company's "Ranking and Rating" system to evaluate her. Plaintiff also argues that defendant prevented her from submitting an updated résumé, which she fails to support with any evidence. Finally, plaintiff maintains that she was more qualified for the SSE position than the individual who was selected and that her qualifications indicate that defendant's explanation is pretextual.

First, plaintiff has not shown that ExxonMobil's practices in evaluating her were any different from those defendant used to evaluate other similarly situated applicants. Second, ExxonMobil sought administrative assistants with advanced computer skills for the SSE department and in the Regulatory 2 department. Plaintiff's performance history at Exxon indicates that plaintiff did not have sophisticated computer skills at the time of her termination in 1999 and that she was not open to adapting to the new job demands in the SSE department. For instance, as part of plaintiff's first performance evaluation after joining the SSE department, plaintiff noted in a discussion summary that her supervisor in the SSE department believed that plaintiff's weaknesses were her lack of knowledge of the operations of the SSE department and her need to

upgrade her computer skills. See Def.'s Ex. B, Ratcliff Deposition at 115-16; Def.'s Ex. SC to Ratcliff Deposition (8/28/98 PDR Discussion Summary) . Plaintiff did not respond receptively to her supervisor's assessment. She remarked, "While I realize that learning new computer applications could be of benefit to me at some future time, I believe that the training I've received has adequately prepared me to handle my current duties efficiently and timely. Learning other computer applications far in advance of a real need by me would only prove ineffective." See id. (emphasis in original omitted) * On her evaluation for the period from April 1, 1998 to March 31, 1999, her supervisor commented that plaintiff could contribute more to the department if she continued to grow in her knowledge of the SSE group and if she would pursue new computer skills. See id. at Ex. GB to Ratcliff Deposition (Performance Assessment and Counseling Worksheet, 4/1/98 to 3/31/99) Further, in a time-line that plaintiff produced after she was terminated in 1999, plaintiff stated that she was told that her rankings (which were in the lowest group) would improve if she would learn and take on more technical duties. See id. at Ex. 7 to Ratcliff Deposition (Employment Summary).

Plaintiff's argument that the weaknesses noted in her evaluations merely indicated areas in which she was seeking to improve is unpersuasive. Regardless of who detected plaintiff's weaknesses, it is the fact that she needed to improve in areas that were relevant to the newly open positions that led defendant to conclude that plaintiff was not the most qualified applicant. On plaintiff's last evaluation form, plaintiff noted that although one of her strengths was her knowledge and proficiency in a number of computer software applications, advanced computer training would further enhance her ability to perform her job. See id. at Ex. 6.

B.M., the 30-year old female chosen over plaintiff for the job in the Regulatory 2 department, had advanced computer skills and had previous work experience in the computer applications required for the position. See Def. 's Ex. E, Killian Affidavit at ¶ 6.

Plaintiff presents no evidence to indicate these employment records were produced with an eye towards this litigation rather than for the purpose of evaluating plaintiff's job performance at the time. Further, there is no indication that anyone other than the plaintiff cast any doubt on plaintiff's low rankings in her last two evaluations from the SSE department supervisors. In all, plaintiff's evaluations and rankings from the SSE department indicate that she was a satisfactory employee who needed to improve her computer skills and gain further knowledge of SSE operations.

The Court finds that the evaluations plaintiff received when she worked for the Litigation department do not cast doubt on defendant's proffered reason for not hiring plaintiff. First, that position required less sophisticated computer skills than the SSE administrative assistant's position that plaintiff last held and sought to regain. Second, although plaintiff's evaluations from the Litigation department include positive reviews of her performance, and the lawyers she worked with questioned her low rankingsfn3, her low rankings were not revised, and plaintiff has not established that these rankings are illegitimate or are unworthy of consideration for the purpose of assessing the strength of plaintiff's application. Plaintiff was ranked 54th out of 60 employees in 1995, she was 56th out of 62 employees in 1996, and she was 51st out 55 employees in 1997. See Def.'s Reply; Ex. I, Lieber Supplemental Affidavit at ¶ 7. In addition, plaintiff failed

to earn a raise during a 54 month period beginning when she was in the Litigation department. See Def.'s Ex. A, Lieber Affidavit at ¶ 11. These records reflect past assessments of plaintiff's job performance, and the individuals evaluating her application for rehire reviewed these records in light of their department's needs and the records and qualifications of the other applicants. See Def.'s Ex. E, Killian Affidavit at ¶¶ 2-6; Def. 's Ex. F, Cleveland Affidavit at 2-6.

Plaintiff argues that Ray Lieber prevented plaintiff from submitting an updated résumé that listed the computer skills that she acquired after defendant terminated her in 1999. Plaintiff says that Lieber told her that she did not need to send in an updated résumé because he already knew plaintiff. See Pl.'s Memo. in opp. to Mot. for Summ. J. at 4; and Pl.'s Response to Def.'s Reply Memo. at 4. Taken in the light most favorable to the plaintiff, the Court finds that the evidence does not indicate that plaintiff was prevented from submitting an updated résumé for defendant's consideration. Lieber merely told plaintiff that it was not necessary for her to submit a new résumé because he was familiar with plaintiff based on her previous work at Exxon. Lieber did not tell plaintiff that she could not submit an updated résumé or that the company would not consider an updated résumé if she sent one in. Regardless, plaintiff's résumé does not demonstrate that she was "vastly -or even clearly – more qualified for the subject job[s] ." Price, 283 F.3d at 723 ("in order to establish pretext by showing the losing candidate has superior qualifications, the losing candidate's qualifications must 'leap from the record and cry out to all who would listen that [she] was vastly – or even clearly – more qualified for the subject job.'") (quoting Odom v. Frank, 3 F.3d 839, 847 (5th Cir. 1993)). Plaintiff had worked at Shell for only five months before she

contacted Lieber about the jobs at ExxonMobil. Since ExxonMobil knew that plaintiff did not develop sufficiently advanced computer skills in the two years of training she received at Exxon (where she took 12 computer courses), it would have been entitled to be skeptical that she acquired these skills in the mere five months she spent at Shell.

The Court also rejects plaintiff's challenge to defendant's use of the "Ranking and Rating" system to evaluate her application for the job openings. Plaintiff contends that defendant improperly relied on the "Ranking and Rating" system because the system does not reflect plaintiff's performance vis-à-vis the other job applicants. Defendant's policy on rehiring provides that former employees may be rehired at the discretion of the company after "consulting the former employing unit concerning the candidate's performance and work record." See Pl.'s Memo, in Opp. to Mot. for Summ. J. at 9. The "Ranking and Rating" system is a measure of plaintiff's performance as an Exxon employee. The system indicates how plaintiff's performance at Exxon compared to others in similarly situated positions. Therefore, the Court finds that the "Ranking and Rating" system serves as an adequate reference tool for the individuals who made the decision not to rehire plaintiff. In fact, K.H., who was hired instead of plaintiff for the SSE position, received a "B" ranking on her most recent evaluation compared to plaintiff's "C" ranking. See Def. 's Ex. A, Lieber Affidavit at ¶ 29.

Finally, plaintiff maintains that she was not given the same opportunity to compete for the jobs as another former Exxon employee. Plaintiff identified a 34-year old African-American former Exxon employee whom plaintiff says was encouraged to submit an updated résumé, test, and interview for the job openings. See

Pl.'s Ex. A, Ratcliff Affidavit at ¶ 19. Plaintiff submits no evidence to support this bald assertion. She supplies no foundation to show that she has any personal knowledge of the treatment of this employee or that her assertion is otherwise admissible. In fact, in her deposition, plaintiff repeatedly stated that she did not have any personal knowledge of ExxonMobil's hiring practices and procedures for the Fall 2000 job openings and that she was not informed about these matters by other employees. See Def.'s Ex. A, Ratcliff Deposition at 56-60, 67-68, 73. Defendant, on the other hand, submits testimony from the employee in issue that contradicts plaintiff's allegations. She testifies that although she submitted a résumé, no one from ExxonMobil encouraged her to submit one and that she did not test for any of the positions for which she was considered. See Def.'s Ex. H, Shelita Burrell Affidavit at 9 7-8. In response, plaintiff failed to point to any evidence to cast doubt on this employee's testimony. See Price, 238 F.3d at 722 n. 6 (rejecting argument that defendant evaluated plaintiff differently than similarly situated person in the absence of support in the record) . Therefore, the Court finds that plaintiff fails to establish a genuine issue of fact as to her allegation that defendant's proffered justification is a pretext for discrimination.

Regarding plaintiff's assertion that she was more qualified for the position in the SSE department than the person defendant selected, the Fifth Circuit has held that "[t]o establish a fact question as to relative qualifications, a plaintiff must provide sufficiently specific reasons for [her] opinion; mere subjective speculation will not suffice," Nichols v. Loral Vought Systems Corp., 81 F.3d 38, 41 (5th Cir. 1996). Further, "in order to establish pretext by showing the losing candidate has superior qualifications, the losing candidate's qualifications must 'leap from the record

and cry out to all who would listen that [she] was vastly – or even clearly – more qualified for the subject job.'" Price, 283 F.3d at 723 (quoting Odorn, 3 F.3d at 847); see also EEOC v. La. Office of Cmty. Servs., 47 F.3d 1438, 1444 (5th Cir. 1995) ("A fact finder can infer pretext if it finds that the employee was 'clearly better qualified' (as opposed to merely better or as qualified) than the employees who were selected.").

Plaintiff has not raised a fact issue that she was clearly better qualified for the positions in issue. Indeed, plaintiff argues only that she was "more qualified" than the successful candidates. See Def.'s Ex. A, Ratcliff Deposition at 80. Besides caviling with defendant's evaluation procedures, plaintiff argues that she was better qualified than K.H. because she, unlike K.H., had experience working in the SSE department. 'The Fifth Circuit has rejected tile idea that experience is a proxy for "better qualified." See Nichols, 81 F.3d at 41 ("This Court has repeatedly said that an attempt to equate years served with qualifications ... [is] unpersuasive.") (quotations and citations omitted) . Further, plaintiff worked in the SSE department for about only two years before her termination, and K.H. had a longer and more successful tenure at Exxon than plaintiff did. In sum, plaintiff's employment record indicates that she may have been qualified for the jobs but that she was not clearly more qualified than the successful applicants. See Odom, 3 F.3d at 847. Therefore, the Court finds that plaintiff has failed to create a triable issue that defendant's proffered explanation is a pretext because of her qualifications.

Moreover, plaintiff presents no evidence that age or race played any part in defendant's hiring decision. Following Reeves, the Fifth Circuit has repeatedly upheld summary judgment in favor of employers when the

plaintiff created only a weak inference of fact as to whether the employer's reason was untrue, and the plaintiff failed to present evidence that a prohibited attribute played any role in the hiring decision. See Price, 283 F.3d at 723 (citing Reeves, 530 U.S. at 148, 120 S. Ct. at 2109) (noting that there will be cases where plaintiff establishes both a prima facie case and some evidence of pretext, yet "no rational factfinder could conclude that the action was discriminatory").

In Vadie v. Mississippi State university, 218 F.3d 365 (5th Cir. 2000) , the court concluded that the plaintiff could not overcome a motion for summary judgment even though the plaintiff indicated that the defendant's justification was pretextual because the plaintiff failed to present "a scintilla of evidence" that national origin played any role in the hiring process. See 218 F.3d at 372-73. Similarly, in Rubinstein v. Adm'rs. of the Tulane Educ. Fund, 218 F.3d 392, the court rejected a professor's claims of discrimination based on his national origin and religion, even after the plaintiff put forth evidence of pretext. The Rubinstein court found that the defendant's proffered justification for firing the plaintiff combined with the "overall lack of any evidence of discriminatory intent," were sufficient to defeat plaintiff's claim. 218 F.3d at 400. Most recently, in Price, the court determined that even if the plaintiff had presented evidence showing that the defendant's explanation for not promoting plaintiff was pretextual, plaintiff could not survive a summary judgment motion in the absence of evidence from which a reasonable factfinder could infer that the defendant intentionally 'discriminated against the plaintiff. 238 F.3d at 723-25.

As opposed to this case, when the Fifth Circuit has applied Reeves to reverse a district court's grant of summary judgment, there was considerable evidence of

pretext. In Pratt v. City of Houston, 247 F.3d 601, 606 (5th Cir. 2001), the court held that plaintiffs made a sufficient showing of pretext when the evidence demonstrated that the defendant obstructed plaintiffs' efforts to complete the hiring process, the plaintiffs' qualifications were superior to the individual who received the promotion, the defendant gave the successful candidate special treatment, and the supervisor had allegedly discriminated on earlier occasions. See 247 F.3d at 607. Also, in Blow v. City of San Antonio, 236 F.3d 293 (5th Cir. 2001), the court held that the defendant's proffered justification, that it did not receive the plaintiff's application in time, could be false, in light of the plaintiff's evidence indicating that she was misinformed about the application time-line and that an outside applicant was hired before the defendant ever considered plaintiff's application. See 236 F.3d at 295-97.

Here, of the eight people defendant hired, one was 58-years old, one was 51-years old, and one was 49-years old. The only evidence in the record that could relate to plaintiff's age is Lieber's statement to plaintiff, after plaintiff initially asked him about the job openings, that he thought that she had "taken the pension." See Pl.'s Ex. B, Ratcliff Affidavit at ¶ 18. Plaintiff contends that Lieber's statement demonstrates that he was aware that her age would make her eligible for additional benefits if defendant rehired her. The Court finds that Lieber's comment does not suffice as evidence that plaintiff's age played a role in defendant's decision not to rehire her. Lieber said nothing specifically about plaintiff's age or eligibility for future benefits on rehire. Moreover, it is not enough to suggest that age was a factor in defendant's decision by pointing out that plaintiff would have been eligible to accrue additional benefits if she were rehired and that she was not rehired. See Hazen

Paper Company v. Biggins, 507 U.S. 604, 612, 113 S. Ct. 1701, 1707 (1993) . This evidence alone fails to create an inference of discrimination, and Lieber's added comment "I thought you took the pension" does not change this result. Indeed, Lieber was not the person who decided not to rehire plaintiff for the positions for which she was considered.fn4

Further, plaintiff does not even contend that there is evidence that her Eurasian descent factored into defendant's hiring decisions. Therefore, the Court finds that plaintiff fails to present evidence from which a reasonable factfinder could infer that defendant intentionally discriminated against plaintiff. Accordingly, the Court grants defendant's motion for summary judgment on plaintiff's ADEA and Title VII claims.

C. ERISA

Plaintiff contends that defendant failed to rehire her in order to deny her retirement benefits in violation of Section 510 of ERISA, 29 U.S.C. § 1140. Section 510 of ERISA makes it unlawful for an employer to discriminate against a participant or beneficiary "for the purpose of interfering with the attainment of any right to which such participant may become entitled under [an employee benefit plan] ." 29 U.S.C. § 1140.

To establish a prima facie case of discrimination under ERISA, a plaintiff must establish that her employer fired her in retaliation for exercising an ERISA right or to prevent attainment of benefits to which she would have become entitled under an employee benefit plan. Holtzclaw v. DSC Communications Corp., 255 F.3d 254, 260 (5th Cir. 2001) (citing Rogers v. Int'l Marine Terminals, Inc., 87 F.3d 755, 761 (5th Cir. 1996); Hines

v. Mass. Mut. Life Ins. Co., 43 F.3d 207, 209 (5th Cir. 1995)). Plaintiff must also show that she is qualified for the position she seeks. Id. at 261. The plaintiff need not prove that the discriminatory reason was the only reason for discharge, but she must show that the loss of benefits was more than an incidental loss from her discharge. Id. (citing Stafford v. True Temper Sports, 123 F.3d 291, 295 (5th dir. 1997) (per curiam)) . This inference of discrimination can be supported by circumstantial evidence. Id.

Here, plaintiff's right to retirement benefits had vested when she was terminated in 1999. She alleges, however, that defendant failed to rehire her in order to deny her the benefit of a pre-Social Security benefit plan, which would have entitled plaintiff to her company-reimbursed Social Security payments until she qualified for Social Security benefits at age 62. See Pl.'s Ex. A at 2. Defendant contends that plaintiff has no standing under Section 510 because the statute does not cover failure to rehire claims. Defendant further argues that plaintiff cannot establish a prima facie case of discrimination under ERISA.

Assuming, without deciding, that defendant's standing argument is not valid, the Court finds that plaintiff fails to establish a prima facie case of discrimination under Section 510. In Clark v. Resistoflex Company, 854 F.2d 762 (5th dir. 1988), the court, assuming that the plaintiff could state a claim for his loss of an opportunity to enhance his vested pension rights, upheld the district court's grant of summary judgment against a plaintiff in a situation similar to the one presented here. The Clark court held that "where the only evidence that an employer specifically intended to violate ERISA is the employee's lost opportunity to accrue additional benefits, the employee has not put forth evidence

sufficient to separate that intent from the myriad of other possible reasons for which an employer might have discharged him.° 854 F.2d at 771.

Here, defendant's failure to rehire plaintiff has no affect on her previously earned benefits. She merely lost an opportunity to obtain additional benefits. Further, plaintiff puts forth no evidence that could create an inference of discrimination or that could establish a material issue that defendant's legitimate nondiscriminatory reason for not rehiring plaintiff is a pretext and that the real reason was to prevent plaintiff from accruing benefits under an employee benefit plan. See Stafford, 123 F.3d at 295. Plaintiff can point only to Lieber's statement that he thought that plaintiff had taken her pension as support for her position. See discussion, supra at 26-27. Lieber's statement makes no mention of future benefits and in light of the evidence of defendant's legitimate reasons for not rehiring plaintiff, it, without more, fails to create a genuine issue of material fact as to whether defendant violated Section 510 of ERISA.

In addition, this case is distinguishable from Heimann V. National Elevator Industry Pension Fund, 187 F.3d 493 (5th dir. 1999) , in which the Fifth Circuit held that former employee-participants are protected from economic retaliation by their former employers under Section 510 for exercising their rights under the plans, ERISA, and other law. See 187 F.3d at 506. Here, in contrast, plaintiff does not contend that defendant retaliated against her for exercising her rights under a plan, and there is no evidence that defendant retaliated against plaintiff for exercising her rights. Accordingly, plaintiff's ERISA claim is dismissed.

D. Defamation

Under Louisiana law, there are four elements to establish a cause of action for defamation. They are "(1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault (negligence or greater) on the part of the publisher; and (4) resulting injury." Trentacosta v. Beck, 703 So.2d 552, 559 (La. 1997) (citing Restatement (Second) of Torts § 558 (1977)) . The Louisiana Supreme Court defines defamatory statements as follows:

Statements are defamatory only if the words, taken in context, tend to injure the person's reputation, to expose the person to public ridicule, to deter others from associating or dealing with the person, or to deprive the person of public confidence in his or her occupation. Davis v. Borsky, 660 So.2d 17, 22 (La. 1995)

The court decides whether a communication is capable of a particular meaning and whether that meaning is defamatory. Id. (citing Sassone v. Elder, 626 So.2d 345, 352 (La. 1993)). Plaintiff contends that defendant defamed her when it published a statement that she was "unqualified" for the available positions. See Pl.'s First Supplemental and Amended Cmplt. at ¶ 20. Defendant argues that it never published a statement that plaintiff was "unqualified" for the available positions and that it is entitled to a qualified privilege.

During her deposition, plaintiff testified that the defamatory statement was contained in the letter that Ray Lieber wrote to the EEOC in response to the claim plaintiff filed with the EEOC. See Def.'s Ex. A, Ratcliff Deposition at 75-77. In the letter, Lieber stated that Ratcliff was not qualified for certain positions for which she did not ask to be considered. Pl.'s Ex. C, EEOC Letter at 5. Later in the letter, Lieber stated that Ratcliff was qualified for the positions for which

she was considered but that other candidates were more qualified. For example, Lieber stated that "an internal transfer from another department, Ms. Hazel Kratzer, was more qualified for the position." Pl.'s Ex. C, EEOC Letter at 9. Lieber added that "Ms. Ratcliff was also qualified for the position that was vacated by the internal transfer." Id. Plaintiff points to no other alleged defamatory statements in the record.

The Court finds that the Lieber letter contains nothing that a reasonable reader could view as tending to deprive plaintiff of public confidence in her occupation. See Davis, 660 So.2d at 22. To state that an individual is not qualified for a job that she has never performed does not deprive an individual of public confidence in her occupation. In the context of the letter, the Court finds that a reader could not have reasonably understood Lieber's words as intended in a defamatory sense. Sassone, 626 So.2d at 352.

Further, the Fifth Circuit has held that statements made to the EEOC related to a charge of discrimination are entitled to a qualified privilege under Louisiana defamation law. Stocksill v. Shell Oil Co., 3 F.3d 868, 872 (5th Cir. 1993) (quotations omitted) . In order to overcome a qualified privilege, plaintiff has the burden of proving that the individual who made the statement did so with malice or lack of good faith. Id. Good faith or lack of malice "means that the person making the statement must have reasonable grounds for believing that it is true and he must honestly believe that it is a correct statement." Id. The Court finds that the evidence in the record indicates that Lieber had reasonable grounds for believing that the individuals whom ExxonMobil hired were better qualified for the available jobs than plaintiff. Therefore, the Court finds that plaintiff fails to establish a genuine issue of material fact

as to Lieber's malice or bad faith. Accordingly, the Court dismisses plaintiff's defamation claim.fn5

III. Conclusion

For the foregoing reasons, the Court GRANTS defendant's motion for summary judgment dismissing all of plaintiff's claim.fn5

New Orleans, Louisiana, this 13th day of June, 2002

SARAH S. VANCE
UNITED STATES DISTRICT JUDGE

Footnotes

fn1 For confidentiality purposes, the names of the other applicants have been concealed. The initials represent the individual's real initials in reverse order.

fn2 The Court notes that plaintiff did not depose any of the four ExxonMobil employees who gave affidavits in this case.

fn3 See Pl.'s Memo. in Opp. to Mot. for Summ. J., Ex. G (Discussion Summary, April 1994 to April 1995) ; Ex. H (Thomas Keiffer Memorandum, 5/9/96) ; Ex. I (Evaluation, April 1, 1997 to March 31, 1998).

fn4 The Court notes plaintiff's argument that the age range of the employees defendant fired following the 1999 merger indicates age motivated discrimination. Plaintiff does not dispute that this case does not involve claims of illegally motivated discharge or that her claims based on her termination were either waived or have prescribed.

fn5 The Court notes that plaintiff's complaint contains claims of negligent misrepresentation and fraud arising from Lieber's letter to the EEOC. See Pl.'s First Supplemental and Amended Cmplt. at ¶ 23. In the absence of any misrepresentations in Lieber's letter, plaintiff's claims cannot be sustained. See National Council on Camp. Ins. v. Quixx Temp. Serv., Inc., 665 So.2d 120, 122 (La. App. 4 Cir. 1995) (In a negligent misrepresentation claim, plaintiff must show that the defendant owed a duty to plaintiff to supply correct information); Quidry v. U.S. Tobacco Co., Inc., 188 F.3d 619, 627 (5th Cir. 1999) (citing cases) (In Louisiana, the elements of fraud or intentional misrepresentation are: (1) a misrepresentation of a material fact, (2) made with the intent to deceive, and (3) causing justifiable reliance with resultant injury) . Accordingly, the Court dismisses plaintiff's negligent misrepresentation and fraud claims.

1) Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, as amended. - (a) Employer practices: It shall be unlawful for an employer -1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

2) Section 510 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1140. - It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act (29 U.S.C. § 301, *et seq.*), or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.